Supreme Court, U.S.
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No. 01-42

IN THE SUPREME COURT OF THE UNITED STATES

CLIFTON S. COREY
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Congress intended 18 USC §7(3), defining the "special . . . territorial jurisdiction of the United States," to apply extraterritorially by implication and contrary to both international law and the presumption against extraterritoriality to crimes committed on "lands" used by the Untied States in the sovereign territory of foreign nations?

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REPLY TO BRIEF IN OPPOSITION

In its Brief in Opposition, the government quite carefully avoids taking a position on the correctness of the Ninth Circuit majority's decision below that the federal courts have territorial jurisdiction over crimes committed in the sovereign territory of foreign nations. Even in its formulation of the Question Presented, the government admits that the issue is in fact whether 18 USC §7(3) "extends" United States "territorial jurisdiction" to two locations, "a United States military enclave" and "United States diplomatic premises," "in a foreign nation." As the government has already taken a position, as a signatory through military and Department of Justice representatives on the Overseas Jurisdictional Advisory Committee (OJAC), that United States territorial jurisdiction does *not* extend to United States military enclaves overseas, it would be difficult for the government now to argue the opposite in support the Ninth Circuit majority in this case.

Rather than argue the merits of the Question Presented, the government makes four arguments in an attempt to trivialize the issues of this case so that this Court will not consider the issues important for review on certiorari. First, the government argues that the Fourth Circuit is "in full agreement" "on the questions about which the [Second and Ninth] circuits disagree - whether Section 7(3) applies extraterritorially." *See* Brief in Opposition at 6, n.1. Second, the government asserts that the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), which the government claims was passed by Congress partly in response to *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000), "renders that limited disagreement

among the circuits of little continuing significance. Further review by this Court therefore is not warranted." *See* Brief in Opposition at 6-7. The Government claims that "the new law [MEJA] eliminates any prospective ambiguity about federal criminal jurisdiction over persons who, like petitioner, are charged with committing felonies in foreign nations while associated with the United States military" and that prosecutions under MEJA will "account for the overwhelming majority of criminal cases in which Section 7(3) might otherwise have been involved to support extraterritorial jurisdiction." *Id.* at 7-8. Third, the government claims that the issue presented in this petition rarely arises. *Id.* at 8. Fourth, the government points out that Petitioner succeeded in having his conviction below reversed on nonjurisdictional grounds and "[i]f petitioner is retried, the retrial could lead to an acquittal, thus rendering the court of appeals' construction of 18 U.S.C. 7(3) of no further consequence to petitioner."

None of the government's arguments in opposition to the petition in this case is convincing and are addressed seriatim. First, the Fourth Circuit in *United States v. Erdos*, 474 F.2d 157, *cert. denied* 434 U.S. 876 (1973), is *not* in "full agreement" with the Ninth Circuit majority on the question of territorial jurisdiction presented in this petition. Quite the contrary, the Fourth Circuit recognized that it needed to find that the crime committed by the defendant in that case occurred on *United States territory* before it could address the issue of whether the United States had sufficient control over that territory to bring the territory within the ambit of 18 USC §7(3). The Fourth Circuit held that the premises of a United States embassy abroad *is United States territory*. As pointed out in Petitioner's Petition at 8, in actuality, a the premises of a

United States embassy is *not* United States territory. Nowhere does the court in *Erdos* suggest that embassy housing is part of United States territory, nor is there even the slightest hint in *Erdos* that it would find that a "United States military enclave in a foreign nation" is part of United States territory. The truth is that the Ninth Circuit majority stands alone in the face of the Second Circuit, the Fourth Circuit, and all other authorities (as the OJAC Report clearly demonstrates) in applying 18 USC §7(3) extraterritorially.

Second, MEJA was not enacted by Congress in response to the Second Circuit's decision in *Gatlin*. MEJA was working its way through Congress toward final enactment long before *Gatlin* was decided. The driving force behind MEJA was the OJAC which reported to Congress that a "jurisdictional gap" existed for crimes committed on United States military bases overseas - exactly the same "jurisdictional gap" which *Gatlin* recognized in its decision issued *three years* after the OJAC report was submitted to Congress. Yet, in spite of the OJAC and *Gatlin* and all other commentators, the Ninth Circuit majority, with a swipe of the pen, held that Petitioner could be prosecuted for crimes allegedly committed by him on a United States military base located in the sovereign territory of a foreign nation.

The relationship between MEJA and the Ninth Circuit majority is disturbing on several other grounds. 1) There is no reason for a federal prosecutor to proceed under the various restrictions to personal jurisdiction set out in MEJA when a prosecutor can simply proceed under 18 USC §7(3) as interpreted by the Ninth Circuit majority. 2) The issue of jurisdiction is not "eliminated" by the "new law," as the government claims, but remains unsettled

while the Ninth Circuit majority opinion is allowed to stand. 3) The Ninth Circuit majority opinion actually undercuts MEJA by allowing United States federal criminal law to apply to "a national of or ordinarily resident in the host nation," a person specifically excluded by MEJA (18 USC §3267(1)(C)). 4) If this Court allows the Ninth Circuit majority opinion to stand, the two main *false* principles laid out by the Ninth Circuit majority in arriving at its decision (the presumption against extraterritoriality does not apply to jurisdictional statutes and international law permits the United States to apply its criminal law in the sovereign territory of a foreign nation based on the territorial principle) will stand as well - false principles that can be applied in contexts much further reaching than the limited context of this case.

Third, the reason the issue presented in this petition rarely arises is that every federal prosecutor and federal court has known since *Reid v. Covert*, 354 U.S. 1 (1957), and its progeny, that prosecutions like the one brought here against Petitioner *could not be brought* because there was *no jurisdiction* to bring them. To allow the Ninth Circuit majority's opinion to stand would encourage other courts to be led astray based on the Ninth Circuit's fallacious logic.

Fourth, there is no solace or justice in the government's argument that Petitioner might be acquitted if he is allowed to be tried a third time. Where is the justice in saying that there was no harm done by a defendant's being acquitted by a court that had no jurisdiction to try him in the first place? There is no greater injustice than being forced to defend oneself before a court without jurisdiction over a prosecution. What if Petitioner is convicted at a third trial? How would he

again raise the jurisdictional issue? If this Court denies the petition that raises the jurisdictional issue now, it is forever lost to Petitioner in future proceedings.

CONCLUSION

For the foregoing reasons, the Petition ought to be GRANTED.

Respectfully submitted,

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